NO. 3443

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

JULIA WHITE CASTLE,
Plaintiff in Error,

vs.

WILLIAM R. CASTLE, LORRIN A. THURSTON and ALFRED L. CASTLE, Trustees under the Will of JAMES BICKNELL CASTLE, Deceased,
Defendants in Error.

No. 3443
In Error to the Supreme Court of Hawaii

BRIEF OF DEFENDANTS IN ERROR

Upon Writ of Error to the Supreme Court of the Territory of Hawaii

A. G. M. Robertson,
Alfred L. Castle,
Clarence H. Olson,
W. A. Greenwell,
Arthur Withington,
Attorneys for Defendants in Error.

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The defendants' testator, James Bicknell Castle, at his death left an estate of about $600,000 and had insurance policies payable to "the executors, administrators or assigns of the assured" on which was due and payable to said executors, after deducting the amount for which they were pledged, the sum of $54,908.19. The will which provided for the widow, Julia White Castle, nothing less than $1500 per month during her life was waived by her and she elected to take her dower right on July 12, 1918.

Property to the amount of $181,250 was assigned to her as dower. In the allowance of the final accounts of the executors of the will of James Bicknell Castle the Circuit Court judge ordered that sum to be increased by one-third of the proceeds of the insurance policies, holding that she was entitled to dower in said proceeds. From this order the Trustees appealed and the Supreme Court disallowed any dower right in the proceeds of the insurance policies. The statute of dower, Revised Laws, Territory of Hawaii, 1915, Section 2977, is as follows:

"Sec. 2977. In real and personal property. Every woman shall be endowed of one-third part of all the lands owned by her husband at any time during marriage, in fee simple, in freehold, or for the term of fifty years or more, so long as twenty-five years of the term remain unexpired, but in no less estate, unless she is lawfully barred thereof; she shall also be entitled, by way of dower, to an absolute property in the one-third part of all his movable effects, in possession, or reducible to possession, at the time of his death, after the payment of all his just debts."

The insurance policies were not assigned and no personal beneficiary had been designated by the assured. The net proceeds of said policies amounting to $54,908.19 was paid to the executors of the will of James Bicknell Castle. The questions are:

(1) Is a decision allowing the final accounts of an executor in the distribution of an estate and determining the widow's proportion therein under the Hawaiian statute of dower binding on the Circuit

Court of Appeals as involving only a question of local law?

(2) Is the widow entitled to dower in the proceeds of life insurance policies under the Hawaiian statute which gives her one-third of "the movable effects in possession, or reducible to possession, at the time of his (her husband's) death"?

(3) Has this court jurisdiction?

ARGUMENT.

I.

THE DECISION BELOW SHOULD BE AFFIRMED AS INVOLVING ONLY A QUESTION OF LOCAL LAW.

This court has decided when it has concurrent jurisdiction, the order of a probate court is controlled by the local law. In *Newberry v. Wilkinson,* 199 Fed. 673, 680, this court said:

"The federal courts being governed and controlled by the local laws respecting the administration of estates, their jurisdiction, in so far as it is exercised, is necessarily concurrent with the probate jurisdiction of the several states; and, being concurrent, it follows that the orders and judgments of such probate courts in the due and orderly administration of such estates are conclusive and binding on the federal courts. This latter deduction has been observed to be the case in the matter of succession of estates. *Johnson v. Waters,* 111 U. S. 640, 667."

In *Byers v. McAuley,* 149 U. S. 608, the court said, in construing statutes of distribution of estates as to whether second cousins took with first cousins:

"The Supreme Court of the United States had to deal with a question of local law. The state statutes prescribed the scheme of distribution and, if the meaning of those statutes was disputable, the construction put upon them by the state courts was binding upon the Circuit Court."

In re Barry, 42 Fed. Reporter 113, decided in 1844 and printed in the Federal Reporter at the request of a justice of the Supreme Court of the United States, it was held that the decisions of the state of New York, that the keeping of a child of seven years from its father by the mother living separately from him is not in judgment of law a detention or restraint of the liberty of the child, are final in a petition for a writ of habeas corpus in the federal court by an alien for his child in control of its mother in New York.

Slaughter v. Glenn, 98 U. S. 242, decides that the construction of statutes giving married women rights to convey her property is finally determined by the local decisions.

There are no cases directly on the question of dower that the decisions of state courts are final upon federal courts. This is owing probably to the fact that a case can hardly be imagined wherein the question could possibly arise, as in the matter of dower the claimant and the executor must have the same domicile and there cannot be diverse citizenship.

The Supreme Court of the United States, however, in construing an act of Congress affecting dower says, in *France v. Connor,* 161 U. S. 65:

"Although Congress has the undoubted power to annul or modify at its pleasure the statutes of any territory of the United States, yet an intention to supersede *the local law* is not to be presumed unless clearly expressed. (Authorities.) It cannot be presumed that Congress in an enactment which was peculiarly called for in the Territory of Utah intended to make so important a change in the law of real property in other territories of the United States."

Although the Court of Appeals is now sitting as an appellate court rather than a court of concurrent jurisdiction, all the decisions of the Supreme Court of the United States, when it occupied the same position that the Court of Appeals occupies now towards the Supreme Court of the Territory of Hawaii, held that the Supreme Court of the United States would be governed by the principle laid down for federal courts when construing local law as a court of concurrent jurisdiction.

The plaintiff in error contends that her right to dower is determined by Section 2977 of the Revised Laws of the Territory of Hawaii. Nothing is better settled than that in the construction of a local territorial statute the Supreme Court of the United States will follow the local court.

Kealoha v. Castle, 210 U. S. 149.
Luke v. Smith, 227 U. S. 379.

See also:

John Ii Estate v. Brown, 235 U. S. 342.
Hapai v. Brown, 239 U. S. 502.
Lewers & Cooke v. Atcherley, 222 U. S. 285.
Jones v. Springer, 226 U. S. 148.

Lewis v. Herrera, 208 U. S. 309.
Crary v. Dye, 208 U. S. 515.
Clason v. Matko, 223 U. S. 646.

It would seem as though no statute can be of more local character than that determining dower which depends upon domicil.

The case of *Cordova v. Folgueras y Rejos,* 227 U. S. 375, in which the interpretation of a statute involving the right of a natural child seeking filiation, where it was argued that it was not a matter of procedure under the code; but as to the existence of a right, Mr. Justice Holmes says of the decision of the local court, that of Porto Rico:

"It concerns local affairs under a system with which the court of the Island is called on constantly to deal, and we are not prepared, as against the weight properly attributed to the local decision, to say that it is wrong. *Gray v. Taylor,* 227 U. S. 51."

It is well settled that in appeals from Hawaii, the territories, the Philippine Islands and Porto Rico, the Supreme Court of the United States follows the local court, unless clear and manifest error is shown.

II.

A FEDERAL COURT HAS NO CONCURRENT JURISDICTION TO REVIEW THE QUESTION OF AN ALLOWANCE OF AN EXECUTOR'S ACCOUNT EVEN IN BEHALF OF A NON-RESIDENT.

Waterman v. Canal Louisiana Bank & Trust Co.,

215 U. S. 33-45, Mr. Justice Day, in upholding a bill in equity which was an action *in personam,* states the rule "for it is the result of the cases that, insofar as the probate administration of the estate is concerned in the payment of debts and the settlement of accounts of the executor or administrator, the jurisdiction of the probate court may not be interfered with."

III.

THIS COURT, SITTING IN AN APPELLATE RATHER THAN A CONCURRENT CHARACTER, MAY HAVE JURISDICTION AND YET THE RESULT IS THE SAME BECAUSE IT IS BOUND BY THE LOCAL LAW.

The rule has been recently affirmed in a memorandum decision in *Boeynaems v. Ah Leong,* 242 U. S. 612.

IV.

THE RULING IS THE SETTLED LAW OF HAWAII.

In the case of the *Estate of Ena v. Ena,* 18 Haw. 588, it was decided that a short term lease was not included in the provision of the statute of dower as real estate, and although it is personal property there was no dower because the lease was not a movable effect in possession or reducible to possession. It thus appears that while this lease was assets of the estate, that is not the vital question in determin-

ing dower in personalty, but as to whether it is a "movable effect."

In re Alexandre, 19 Haw. 551, the Court was called upon to decide whether the proceeds of a life insurance policy were

1. Assets of the estate.
2. Subject to dower.

The first question was decided in the affirmative and the second in the negative on the ground that the proceeds were not "movable effects in possession or reducible to possession" at the time of the testator's death.

In both this case and the Alexandre case the following facts are common:

(1) The proceeds in both cases were payable to such persons as should be designated by will or had been designated by order left with the executive officers of the insurer.

(2) In both cases there had been a designation of the executors as beneficiary.

(3) In both cases the widow had been provided for by will.

(4) In both cases the widow had elected dower.

(5) In the Alexandre case there was a specific determination by the court that the proceeds of the policy were assets of the estate, and the court held that the widow had no dower therein, yet it is upon the fact that the proceeds of the policies in the case at bar are assets of the estate that the widow bases her claim to dower.

(6) Upon all these facts, the court held that

"The money in question was not personal property of the decedent nor any part of his movable effects in possession or reducible to possession by him at the time of his death, nor was it subject to any disposition other than that which he should direct by will or written declaration to the society."

That is exactly the claim of the trustees in the case at bar.

In re Vida, 1 Haw. 107, the court in discussing the phrase "immovable and fixed property" when construing the dower statute says these words are used, to mean lands and tenements, in contradistinction to money, goods, wares, furniture and other species of movable property. All of these have situs, while the insurance policy in this case had merely a situs as a paper or as evidence of a right to the proceeds after the death of James Bicknell Castle.

V.

THE CONSTRUCTION OF THE STATUTE IS TO BE THE SAME NOW AS IN 1846.

The plaintiff in error argues that times have changed and that a more liberal view as to a widow's right to dower should be taken by the courts of the present day. Passing the question whether the liberal or modern view is not that which works an absolute separation of interest in the other's property save by inheritance by husband or wife, the answer is that the words "movable effects in possession or reducible to possession at the time of his death"

mean exactly what was meant at the time the statute of 1846 was passed.

It is not for the courts to change the meaning of statutes, but for legislatures. This is best illustrated in the case of *Commonwealth v. White,* 190 Mass. 578, which was a conviction of the defendant for violating the Sunday law by doing work which was not "necessary". The court said that the word necessity meant the same as it did when it was passed in 1690, and if a change was desired it was for the legislature and not the court to make the change. The meaning of a word may enlarge by time through changes in material things, as the word vehicle used in 1846 might now include an automobile in a statute with such an intent, but the abstract idea conveyed by the difference between what is tangible and what is intangible doesn't change by time.

VI.

THE APPEAL SHOULD BE DISMISSED, AS THERE HAS BEEN NO FINAL DECREE FROM WHICH AN APPEAL HAS BEEN TAKEN.

It is respectfully suggested that the probate court has since refused to enter a final decree in pursuance of the mandate of the Supreme Court of the Territory of Hawaii,treating this appeal as a supersedeas; that upon entry of a final decree the identical questions herein set forth may be brought to this court; that although the defendants in error cannot waive the question of jurisdiction, the records show matters

which on their face determine all questions and which are so nearly akin to the question of jurisdiction as to be almost indistinguishable, to-wit:

First, circuit courts hold they have no jurisdiction to review an order of distribution of the assets of an estate by a state court.

Second, this record shows, on page 32, that the plaintiff in error signed an assent to a decree agreeing with the executors that these assets of the estate should pass to the defendants in error.

Third, this is plainly a local decision which this Court affirms as a matter of course without reviewing the merits.

VII.

THERE IS NO QUESTION RAISED AS TO DOWER IN THE CASH SURRENDER VALUE OF THE POLICIES OF INSURANCE, WHICH HAD EVIDENTLY BEEN EXHAUSTED BY THE LOAN ON THEM BY THE NEW YORK LIFE INSURANCE CO. OF $65,169.72.

The plaintiff in error attempts in her brief to open up a question which has never been raised and is not now raised under her assignments in error, to-wit: Whether she was entitled to dower in the surrender value of said life insurance policies. As the amount of insurance according to the accounts was $120,077.91, and there is deducted therefrom the debt to the New York Life Insurance Co. of $65,169.72, leaving a balance of $54,908.19, being the sum admitted as having been received by the executors, it would

appear that the testator had availed himself substantially of any cash surrender value. But the question to be determined is whether the widow was entitled to dower in the surplus or proceeds paid to the executors as beneficiaries named in the policies. This is the vital distinction between the policy as a chattel and the proceeds of the policy which passed from the insurance company to the executors after the death and were never in the possession of the testator and to reduce which to possession was never in his power.

The only case cited in the plaintiff in error's brief, *Gould v. Emerson,* 99 Mass. 154, involved the construction of a Massachusetts insurance statute for the benefit of married women, and so far as the case has any bearing on the question herein involved supports the contention of the defendants in error. J. B. Castle named his executors as beneficiaries under the policies to take in trust for his creditors and the purposes of his will. They did not take for the benefit of anyone who attacked his will.

VIII.

THE GENERAL PROPOSITION OF LAW IS CORRECT.

2 Bouvier's L. Dic. 2266 says of "movables" that:

"Things movable by their nature are such as may be carried from one place to another, whether they move themselves, as cattle, or cannot be removed without an extraneous power, as inanimate things. * * * Movables are further distinguished into

such as are in possession, or which are in the power of the owner, as a horse in actual use, a piece of furniture in a man's own house; and such as are in the power of another, and can only be recovered by action, which are therefore said to be in action, a debt. But it has been held that movable property, in a legacy, strictly includes only such as is corporeal and tangible; not, therefore, rights in action, as judgment or bond debts." Citing authorities.

Sullivan v. Richardson, 33 Fla. 1, 14 So. 692, 709, says:

"Things were divided into those which were corporeal and those which were incorporeal; the former being those which may be seen and touched, and they being either movable or immovable, and movables being those which can move naturally by themselves, or be moved by man, and immovables being those which can neither move naturally themselves, nor be moved by man."

In discussing the question of whether proceeds of insurance policy went by succession so as to be subject to the succession tax, the Massachusetts court says in *Tylor v. Treasurer and Receiver General,* 226 Mass. 306, 115 N. E. 300, 301:

"The insured retains no ownership of that which has passed to the beneficiary under the contract. A reserved right to change the beneficiary does not effect the essential nature of the rights of the beneficiary so long as they last. Whatever the insured does in way of designation of a beneficiary takes effect forthwith. If his act rightly be describable as a gift, it is a present gift which, so far as concerns him, takes effect at once both in possession and enjoyment by the beneficiary. *Atty. Gen. v. Clark,* 222 Mass. 291, 110 N. E. 299. There is no fund in which

he has an ownership which is the subject of his act in designating the beneficiary, as in *New England Trust Co. v. Abbott,* 205 Mass. 279, 91 N. E. 379. * * * The insured has no title to the amount due on the policy. He does not and cannot make a gift of that. The right to that amount as an instant obligation does not spring into existence until after his death. Even then the money belongs to the insurer, who is charged with the duty by the contract to pay the beneficiary. So far as the insurer is a 'grantor,' to use the words of the statute, the only thing which he grants or can grant is an interest in a contract."

A gift *causa mortis* passes out of the donor by his death and ownership ceases by the same event which gives rise to a right to proceeds of insurance. If a man had $10,000 in cash of which he made a gift *causa mortis* and an insurance of $10,000 payable to his executors, he could not be in possession of both sums at the same time, as there was no time at which the rights were concurrent in him or his executors. Consequently a widow under the Hawaiian statute could not have dower in both.

In *Hatcher v. Buford,* 60 Ark. 169, 27 L. R. A. 507, the court held a husband died seized or possessed of a gift *causa mortis.*

In *Andrews v. Partridge,* 228 U. S. 479, the court held that the trustee in bankruptcy was only entitled to the cash surrender value of a policy, the insured having died before he was discharged. This was in construing the bankruptcy act.

Life insurance was payable to the legal heirs or assigns of the deceased. By his last will and testament the deceased bequeathed the policy to his chil-

dren. His widow renounced the will, in conformity with the provisions of the statute, and elected to take in lieu thereof her dower and legal share in the estate. The question arose whether she was entitled to one-third of the insurance money which she claimed as legal heir. The dower provision of the statute gave the widow as her absolute personal estate one-third of all the personal estate of the intestate. The court held that this dower right did not make the widow an heir and that consequently the entire amount of the policy was payable to the children. The statute also provided that upon her renunciation of the will, a wife was entitled to dower in the land and to one-third of the personal estate after the payment of debts.

Gauch v. St. Louis M. L. Ins. Co., 88 Ill. 251, 30 A. R. 554.

A life insurance policy payable to the assured, his executors, administrators and assigns, is assignable and does not constitute an asset of the succession of the person insured and so come within the prohibition against assignment of the Civil Code. The court said:

"And it is evident that Stuart had no succession in the ordinary acceptation of the term, while living, and his heirs had no inheritance. The denunciation of Article 2454 of the code is directed against a sale of the succession of a living person, which it declares not to be the subject of sale, evidently because such a sale could, in the very nature of things, only be prospective and uncertain; the law declaring that

'succession is the transmission of the rights and obligations of the deceased to his heirs.' Rev. Civ. Code, Art. 871 et seq."

Stuart v. Sutcliffe, 46 La. A. 240, 14 So. 912.

Where a policy of insurance was taken out on the life of the mother for the benefit of the daughter, the proceeds belonged to the daughter and formed no part of the succession of the mother.

Succession of Emonot, 109 La. 359, 33 So. 368.

Attorneys for Defendants in Error.